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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, Copartners trading as ADAMS & KITCHEN, et al., *Petitioners,*

vs.

ANDREW W. MELLON, Director General of Railroads, and UNION STOCK YARD & TRANSIT COMPANY, *Respondents.*

BRIEF OF ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, RESPONDENT, IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SIDNEY F. ANDREWS, GENERAL SOLICITOR UNITED STATES RAILROAD ADMINISTRATION,

Hurley-Wright Building, Washington, D. C.,

A. A. McLAUGHLIN, 1115 Bankers Trust Building, Des Moines, Iowa,

Counsel for Respondent, Andrew W. Mellon, Director General.

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BRIEF OF ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, RESPONDENT, IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

For resistance to the petition for certiorari filed herein, Respondent Andrew W. Mellon, Director General of Railroads, respectfully shows to this Honorable Court:

I.

STATEMENT DEEMED NECESSARY TO CORRECT INACCURACIES AND OMISSIONS IN PETITIONERS' SUMMARY STATEMENT OF MATTERS INVOLVED.

The Stock Yard Company was created by a special act of the Legislature of Illinois, approved February 13, 1865,

with the right to construct necessary buildings, railroad tracks, loading and unloading platforms, for the accommodation of the business of a general Union Stock Yards for cattle and other livestock, and to construct, maintain and operate a railway for its yards and to connect with the tracks of all railroads terminating in Chicago. (R. 123-124.) The yards were constructed and tracks connecting with other lines of railroad were established, the shares of the Stock Yard Company being owned by the railroads terminating in Chicago until 1894, at which time the railroads divested themselves thereof, and have since said time had no pecuniary interest therein. During such period no charges were made for the use of the tracks in reaching the yards with trains of the line-haul carriers. After the line-haul carriers disposed of their interest, the Stock Yard Company made a trackage charge against the railroad companies for use of its tracks, which was assessed on a per car basis in the sum of 75c per car each way (loaded in and empty out). (Defendants' Exhibit 6, pages 475 and 476, not printed in record, but certified up as a part thereof).

A full history of the organization and development of the Stock Yard Company up to 1894 is contained in *Interstate Commerce Commission v. C. B. & Q. R. R. Co.*, 186 U. S. 320. A full history up to the time of the shipments in controversy is contained in the opinion of the Interstate Commerce Commission, dated February 11, 1919, in these proceedings in case entitled *Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., et al.*, 52 I. C. C. 209. (R. 121-140). The facts are also fully and accurately stated in the opinion of the Circuit Court of Appeals. (R. 389-399).

Subsequent to the assessment of the trackage charge, the line-haul carriers continued to receive and transport shipments of livestock in carloads from and to the Stock Yards, transporting them with their own locomotives and crews, and continued to absorb the loading and unloading charges

in the sum of 25c for unloading and 50c for loading each car of livestock. After the assessment of such trackage charge, the line-haul carriers published their terminal tariffs containing a charge of $2.00 per car for the service of moving cars between the Stock Yards and points on their lines. This $2.00 charge was assailed by the shippers and was held unreasonable by the Interstate Commerce Commission, but the Commission's conclusion was overruled and the charge upheld in *Interstate Commerce Commission v. C. B. & Q. R. R. Co.*, 186 U. S. 320 (R. 124-125). The Stock Yard Company, from the beginning, performed the service of loading and unloading all livestock at the yards, and in 1867 established a charge of 50c per car for loading and 25c per car for unloading, which charge continued in effect until May 21, 1917. (R. 122-124).

In 1897 the Stock Yard Company leased all of its railroad property to the Chicago Junction Railway Company (for brevity hereafter referred to as Junction Company), for a period of fifty years, in consideration of a share of the net profits, the Stock Yard Company retaining to itself the loading and unloading platforms and yards, which it continued to operate, and the Junction Company thereafter operated the railroad property. (R. 124).

In 1911 an action was brought by the Interstate Commerce Commission in the Commerce Court to compel the Stock Yard Company and the Junction Company to file tariffs with the Interstate Commerce Commission covering their charges, in conformity with Section 6 of the Act to Regulate Commerce. The case went to the Supreme Court of the United States, where the contention of the Commission was upheld in 226 U. S. 286, and the Junction Company and the Stock Yard Company were both held to be common carriers and required to file tariffs with the Commission. (R. 125-126).

In compliance with such decision, the Stock Yard Com-

pany filed its tariffs with the Commission showing its charges for loading and unloading livestock. (R. 127).

In 1913, the lease with the Junction Company was cancelled and a new lease entered into by which the Stock Yard Company received a fixed rental for its property instead of a share of the net profits. The line-haul carriers filed tariffs covering their terminal charges, which included a provision that the line-haul carriers would absorb charges of the Stock Yard Company in the sum of 50c for loading and 25c for unloading each car of livestock received from or transported to the Stock Yards. (R. 223-225 and Exhibit 2 to Defendant's Exhibit 1. Exhibit 1 is a stipulation which is printed in the record, but the exhibits thereto are not printed, but certified up as a part of the record).

The language of the absorption tariff is:

"CARRIERS AS SHOWN WILL PAY THE UNION STOCK YARDS AND TRANSIT COMPANY'S CHARGES AS FOLLOWS:

Loading	Unloading
In cents per car	In cents per car
50	25 "

By tariffs filed with the Interstate Commerce Commission, effective May 21, 1917, the Stock Yard Company increased its loading and unloading charges 25c per car, so that the charges thereafter for such service became and were 75c per car for loading and 50c per car for unloading.

The line-haul carriers refused to pay the increased charges and did not amend their tariffs, but continued their absorptions under tariffs theretofore in effect and continued in effect. (R. 122-123).

The Stock Yard Company was maintaining a great public livestock market and the prompt unloading and release of livestock to it was essential to its activities. The counting, weighing and paying of charges before delivery was incompatible therewith. In consideration of such prompt release, the Stock Yard Company for many years had assumed the responsibility for counting the stock, checking its condition and collecting the freight charges. The freight bills were prepared by the line-haul carriers, delivered to the Auditor of the Stock Yard Company, who made collection from the commission men, who were the consignees, and proceeds were remitted to the carriers weekly. When the line-haul carriers refused to absorb the increased charges, the Stock Yard Company in its effort to make them do so, held the amount thereof out of the freight charges collected by it. The carriers protested and were making arrangements to collect their own charges, whereupon an understanding between the carriers and the Stock Yard Company was reached; pursuant to which the line-haul carriers in making out their freight bills, included the additional charge of the Stock Yard Company, stating in the bill that such charge is "Per U. S. Y. T. Co. No. 2." (The Stock Yard Company's tariff increasing its charges).

The bills as thus made out were collected by the Stock Yard Company from the commission men, who paid same out of the proceeds of the sale of the shipments, remitting net balance to shippers. (Testimony Witness Byers, Original Exhibit 6, pages 472 to 476, 496 to 498 and 504 to 512, original Exhibits certified to this Court, Printed Excerpts of said Exhibit 37 to 43).

This arrangement was made before Federal control of railroads and was followed during that period. Neither the Stock Yard Company nor its property was taken under Federal control. A copy of the Stock Yard Company's tariff increasing its charges is attached to Defendant's Exhibit 1 as

a part of Exhibit 1 thereto, original exhibits certified to this Court.

The line-haul carriers were not a party thereto and did not authorize or consent to the filing thereof. On the title page of such tariff, however, is the following: "The charge made by this Company for the service (as a carrier's agent) of loading and unloading livestock at the Union Stock Yards at Chicago, Illinois, is as follows, etc."

Then follows the charge of 50c per car for unloading and 75c per car for loading.

The Stock Yard Company had no authority from the line-haul carriers to file said tariff as their agent, or otherwise, (Testimony Mr. Henkle, General Manager Stock Yard Company, Defendant's Exhibit 6, page 344, original certified to this Court), nor was such tariff filed at instance of the line-haul carriers. (Testimony Auditor Chace, Stock Yard Company, Defendant's Exhibit 6, page 372; testimony Witness Byers, Freight Traffic Manager, C. & N. W. Railway Company, Defendant's Exhibit 7, page 1260, original certified to this Court).

The files of the Interstate Commerce Commission show no authority for the statement "as carrier's agent." (Testimony Witness Gohegan, Exhibit 11, page 1242, original certified to this Court).

The rates of the line-haul carriers were predicated on the livestock in carloads, being loaded and unloaded by the shippers. (Witness Byers, Defendant's Exhibit 6, page 459, original certified to this Court).

The tariffs of the line-haul carriers are with reference to the appropriate classifications. Line-haul tariffs refer to the absorption tariffs showing what terminal charges will be absorbed. (Witness Byers, Defendant's Exhibit 7, pages 1251-1252, original exhibit certified to this Court).

Official Classification applicable to roads east of Chicago required the use of Uniform Livestock Contract published

therein. Such contract provides that the livestock is received subject to the classifications and tariffs in effect and that the carrier "agrees to convey to its usual place of delivery at said destination, if on its road; otherwise to deliver to another carrier on the route to said destination"; also that the shipper shall load and unload the livestock.

Rule 8 on page 223 of said Classification also provides:

> "The consignor and consignee are responsible for loading and unloading the same, the carrier assuming no liability whatever in regard to loading and unloading."
>
> (Exhibit 3 to Defendant's Exhibit 1, original certified to this Court).

Western Classification applicable to western roads, Illinois Classification applicable to intrastate shipments in Illinois, and Consolidated Classification issued by the Director General during Federal control applicable to all roads, contain substantially the same provisions. (Exhibits 3, 4, 5 and 6 to Defendants' Exhibit 1, original certified to this Court).

Witness Byers testified that the classifications and tariffs of the carriers provide that the shipper must load and unload livestock. (Defendant's Exhibit 6, pages 455-6). Witness Mosier, Vice President, Chicago Livestock Exchange, testified that the livestock contracts covering transportation of livestock, long in use by the railroads, made the same provision. (Defendant's Exhibit 6, page 150).

On July 7, 1917, the Stock Yard Company issued a supplement to the tariff in which it had increased its charges, in which it sought to cancel such charges as a tariff matter, on the theory that it was no longer a common carrier and subject to the Commerce Act, and that it was not required to file tariffs of its charges with the Commission. The Commission suspended such supplement and set the matter down for hearing under I and S Docket 1118, and thereafter extended such suspension order from time to time, thus keep-

ing the tariff covering the Stock Yard Company's charges in effect.

On November 17, 1917, the Chicago Livestock Exchange filed a complaint with the Commission, which was docketed as No. 9977. (See Defendant's Exhibit 2, R. 243-256). This was before Federal control. In such complaint it was charged that the collection of the 25c additional charge from the shippers was in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce. Dockets I and S 1118 and No. 9977 were consolidated, and after hearing, the Commission on February 11, 1919, in opinion reported 52 I. C. C. 209, dismissed the complaint. (Plaintiff's Exhibit 1, R. 121-141). In that proceeding the Stock Yard Company insisted that by reason of the change in the form of its lease to the Junction Company, it was no longer a common carrier and therefore not obliged to file and maintain its tariffs. The Commission denied such contention and held that the Stock Yard Company was still a common carrier. (R. 129). The Commission reviewed its former decisions on the subject, and without referring to the classification and tariff provisions governing loading and unloading, held that the duty to load and unload livestock was the duty of the shipper. (R. 131-136 and 138-139). The Stock Yards were not under Federal control and the Director General was not a party to the proceeding. (R. 139). The suspension order was allowed to lapse and the Commission on March 13, 1919, amended its order dismissing the complaint by requiring the Stock Yard Company to file a supplement to its tariff, restoring and continuing the tariff sought to be cancelled in effect *nunc pro tunc*, as of December 31, 1918, the date the suspension order lapsed. (R. 237).

On March 31, 1919, the Stock Yard Company and the Chicago Livestock Exchange filed petitions for rehearing, and on April 14, 1919, the Commission reopened the proceeding and in the order doing so, named the Director General as a

respondent. (R. 237-238). While such proceeding was pending on rehearing, Congress enacted the Transportation Act of 1920 containing a provision amending Section 15 of the Act to Regulate Commerce as follows:

> "Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stock yards shall include all necessary services of unloading and reloading en route, delivery at public stock yards of inbound shipments in suitable pens and receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee or owner."
>
> (49 U. S. C. A. Section 15, Paragraph 5).

This provision became effective at the end of Federal control, March 1, 1920, and the railroad companies having been restored to the possession of their properties in compliance with this statute, amended their tariffs to provide for absorbing the entire loading and unloading charges.

On July 15, 1920, the Commission rendered its opinion on the rehearing, (58 I. C. C. 164), in which without serious discussion it adhered to its conclusion that the Stock Yard Company is a common carrier and that its services in loading and unloading were part of the transportation of such livestock, but announced that it was in error in its former opinion in holding that the duty to load and unload livestock was that of the shipper. In such opinion the Commission said:

> "As the services of unloading and loading are part of the transportation of live stock the collection of separate charges from the shippers for unloading or loading in addition to the rates on livestock from and to interstate points to and from the stockyards was an unlawful and unreasonable practice." (R. 144-145).

The complaint did not attack the line-haul rate or the terminal charge or the reasonableness thereof and no evidence was taken at any hearing on the question of the reasonableness thereof or of the charge made by the Stock Yard Company.

On February 25, 1921, the Chicago Livestock Exchange filed a further complaint with the Commission, charging that the collection of the 25c additional charge from the shippers was a violation of the Commerce Act. This complaint was docketed as No. 12614. The findings and opinion in the prior proceeding were relied on and recovery of the charges paid was sought in behalf of the commission men. (R. 238 and Defendant's Exhibit 3, R. 257-267). In the hearing thereon, proof was offered in behalf of petitioners in reference to the payment of the increased charge of 25c.

The following is illustrative:

Witness Burmister testified:

"Q. To whom did you pay the charges? To the stock yards company or the line-haul carriers?

A. The checks were all made out to the Union Stock Yard & Transit Company.

Q. And all of the charges paid to that company?

A. Yes, sir.

Q. Now, did you, in making settlement with the shippers, charge them for the unloading charges?

A. Yes, sir.

Q. As a matter of fact, now, Mr. Burmister, you are not out the twenty-five cents?

A. No, sir.

* * * * *

Q. Now, Mr. Burmister, is a uniform plan or uniform method of payment of charges followed by every commission firm?

A. Yes, sir.

(Defendant's Exhibit 9, pages 219 and 220, original certified to this Court).

Witness Gillogly testified:

"We deduct all charges before we pay the principal anything."
(Defendant's Exhibit 9, page 277, original certified to this Court).

Witness Wilson testified:

"Q. In every case where you paid this charge you collected the amount from the owner of the stock, didn't you?
A. Yes.

* * * * *

Q. You got the 25 cents, though, from the shipper?
A. We paid that with his own money, not with our money."
(Defendant's Exhibit 9, pages 363 and 364, original certified to this Court).

The additional 25c charge was collected on authority of the Stock Yard Company's tariff. C. C. Chace, Auditor of the Stock Yard Company, entrusted with the duty of making the collections, testified:

"Q. Do you know under what authority the loading and unloading charges were collected or assessed?
A. On the authority of the Stock Yard's tariff."
(Defendant's Exhibit 9, page 181, original certified to this Court).

Mr. Henkle, General Manager of the Stock Yard Company, testified that if the Commission would permit the Stock Yard Company to cancel its tariff containing the charge complained of, the Stock Yard Company would cease collecting same from the shipper. (Defendant's Exhibit 6, page 342, original certified to this Court). The Commission found:

"The Stock Yard Company collected and retained such charges from the shippers." (R. 123).

No. 9977 was consolidated with No. 12614 and the Commission's opinion thereon was rendered June 2, 1925. (Plaintiff's Exhibit 3, R. 147-157). In that opinion the Commission said:

> "Most of the reparation claimed is by the livestock commission merchants, members of the exchange, covering amounts collected from them for the unloading service at the stockyards. They seek reimbursement in their own names and right as parties to the transportation transactions who paid the charges to the defendant carriers and also as factors and agents for and on behalf of the livestock shippers who were the consignors. While it is admitted that in each and every instance the charge which was paid by the commission merchant was subsequently charged back and collected from the consignors, this would not affect the right of the complainant consignees to awards of reparation."

Also:

> "We find that the following individuals, copartnerships, and corporations, parties of record, made the shipments as described in this and our preceding reports and paid the charges thereon, herein and heretofore found to have been unreasonable and unlawful; that they have been damaged in the amount of such charges and are severally entitled to reparation, as factors and agents for the shippers, with interest from date of payment."

Then follows names of the commission merchants, plaintiffs in this suit. (R. 151-156).

Following such opinion Rule V Statements were filed by the plaintiffs, and pursuant thereto, the award sued on was entered December 12, 1927. (R. 157-210). Such Rule V Statements consist of many thousand sheets contained in a large box, marked "Exhibit 37" and the original has been certified to this Court. (R. 283). The award was against the Stock Yard Company and Director General of Railroads jointly. They denied the validity of the Commission's award,

refused to pay the same, and this suit was commenced. The award is in favor of the plaintiffs; not the shippers, and in the petition recovery is sought in behalf of the commission men, the plaintiffs in their own right. (R. 4).

The shipments involved were made by in excess of 174,000 shippers. (R. 323).

The defendants in their answers contended that the findings of the Commission and its award were not supported by evidence, were contrary to law; that the commission men were not the real parties in interest; that they had paid the charges as agents of the shippers and from the shippers' own funds; that the charges were collected pursuant to the lawful tariffs of the Stock Yard Company, which it was bound to enforce; that the line-haul carriers were not permitted under their absorption tariffs to pay the additional charge of the Stock Yard Company; that the reasonableness of the rates was not involved in the proceeding, nor was the question of the amount the line-haul carriers might properly absorb involved. There were other defenses which are not material to the petition for certiorari, in view of the ground upon which the Circuit Court of Appeals affirmed the judgment of the lower court dismissing the petition.

The opinion of the Circuit Court of Appeals (R. 389) sets forth fully and accurately the facts upon which it is based. What the Court decided was that the Stock Yard Company as a common carrier engaged in interstate commerce in unloading and delivering livestock received from the line-haul carriers, to the consignees, was obliged by the Act to Regulate Commerce and by the determinations of this Honorable Court and the repeated orders of the Interstate Commerce Commission to publish tariffs of its charges for loading and unloading livestock, and having done so and not being permitted to withdraw and cancel such tariffs, was obliged to collect the charges provided for therein from the shippers for whose benefit the service was rendered, and having made

such collection, it was guilty of no unlawful act and the charges so collected could not be recovered back. The Circuit Court of Appeals did not adopt the reason relied upon by the District Court in denying right of petitioners to recover, but expressly refused to do so. (R. 394-395).

SUMMARY OF ARGUMENT.

I.

Petitioners assume an erroneous and misleading state of facts in support of "Reasons Relied upon for Allowance of Writ," as set forth in petition, and in "Specifications of Errors" relied on in their brief in support of petition, in the following particulars:

A. Petitioners state that tariffs of the line-haul carriers included the service of loading and unloading the livestock at the Union Stock Yards, Chicago, whereas such tariffs included only transportation to the Stock Yards and the absorption of a specific amount in cents per car for loading and unloading.

Boardman & Co. v. S. P. Co., 37 I. C. C. 331.
Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., 52 I. C. C. 209.
Interstate Commerce Commission v. C. B. & Q. R. R. Co., 186 U. S. 320.
Interstate Commerce Commission v. Stickney, 215 U. S. 98-105.

B. Petitioners ignore the fact that the Stock Yards Company was an independent common carrier holding itself out to perform the loading and unloading service on its own property devoted to public use for which it published a tariff of its charges.

United States v. Union Stock Yards & Transit Co., 226 U. S. 286.

Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., et al., 52 I. C. C. 209.
Chicago Livestock Exchange v. Atchison, Topeka & Santa Fe Railway Co., et al., 58 I. C. C. 164.

C. Petitioners ignore the fact that the loading and unloading of livestock at the Stock Yards was a part of the transportation thereof, performed by an independent common carrier with its own employes and upon its own premises devoted to public use.

Covington Stock Yards v. Keith, 129 U. S. 126.
United States v. Union Stock Yards & Transit Co., 226 U. S. 286.

D. Petitioners repeatedly state that the Stock Yard Company was the agent of the line-haul carriers in performing the service of loading and unloading livestock, whereas the record shows it was an independent connecting common carrier, performing its service under and pursuant to its published tariffs and without any arrangement or contract with the line-haul carriers, and without any joint tariff in respect to same.

E. Petitioners ignore the fact that the Stock Yard Company did not join or concur in the tariff of the line-haul carriers and that the line-haul carriers did not join or concur in the Stock Yard Company's tariff.

F. Petitioners ignore the testimony conclusively showing no relation of agency, either by reason of contract or tariff provisions, existed.

G. Petitioners assert that the Stock Yard Company did not collect the charges in controversy, whereas the Commission found that it did so; (First opinion R. 123), the undis-

puted evidence so shows and petitioners in their petition in bringing this suit so allege. (R. 13.)

H. The charge of the Stock Yard Company was limited to the service of loading and unloading.

II.

Common carriers engaged in interstate commerce are required to file tariffs of their charges with the Interstate Commerce Commission and to maintain and enforce the same.

49 U. S. C. A., Pages 11 and 12.

Act to Regulate Commerce, Section 1, Paragraph 3 and 6, appendix 47 and Section 6, Paragraph 7, appendix 49.

United States v. Union Stock Yards & Transit Co., 226 U. S. 286.

Chicago Livestock Exchange v. A. T. & S. F. Railway Co., et al., 52 I. C. C. 209 (R. 129).

Chicago Livestock Exchange v. A. T. & S. F. Railway Co., et al., 58 I. C. C. 164 (R. 144).

Louisville & Nashville Railway Co. v. Maxwell, 237 U. S. 94-7-8.

Keogh v. Chicago & North Western Railway Co., 260 U. S. 156-163.

Louisville & Nashville Railway Co. v. Central Iron Works, 265 U. S. 59-65.

Davis, Agent v. Cornwell, 264 U. S. 560-2.

Davis, Agent v. Henderson, 266 U. S. 92-93.

Mellon, Agent v. Erb, 13 Fed. (2d) 752-3 (C. C. A. 9th Circuit).

III.

The applicable tariffs were plain and unambiguous, no administrative function of the Commission was involved and the Circuit Court of Appeals did not infringe upon any jurisdiction of the Interstate Commerce Commission.

Great Northern Railway v. Merchants Elevator Co., 259 U. S. 285-294, and cases cited in note on page 295.

Interstate Commerce Commission v. Louisville & Nashville Railway Co., 227 U. S. 84-91.

IV.

The absorption tariffs of the line-haul carriers limited and measured their legal right and obligation to contribute to the payment of the Stock Yard Company's charges.

49 U. S. C. A., page 240.

Act to Regulate Commerce, Section 6, Paragraphs 1 and 7, appendix 48-49.

Davis, Agent v. Henderson, 266 U. S. 92-93.

V.

The Interstate Commerce Commission could not find the refusal of the carriers to absorb the increased charges of the Stock Yard Company was unreasonable or require the absorption of the same without evidence showing the line-haul rate, plus the terminal charge, was so high as to be unreasonable, unless the increased charge should be included in the absorptions provided for, nor without evidence and a finding that a failure to absorb such increased charge would result in discrimination.

Baltimore & Ohio Railroad Co. v. United States, 277 U. S. 291-301-2.

Florida East Coast Railway Co. v. United States, 234 U. S. 167.

Wells Paper Co. v. Pennsylvania R. R. Co., 62 I. C. C. 705.

Hunt, Ferris & Co. v. Chicago & North Western Railway Co., 68 I. C. C. 283-4.

VI.

The appeal to the Circuit Court of Appeals was from the judgment entered in the District Court, and not from the reasons therefor announced by the District Judge, and since the Circuit Court of Appeals based its judgment of affirmance on an entirely different ground, the reasons announced by the District Judge may not be considered in determining whether petition for certiorari should be granted.

Section 347, U. S. C. A., Title 28.

VII.

No question of public importance or other question on account of which a writ of certiorari should be granted, is presented.

Furness, Witting & Co. v. Yang'tsze Insurance Co., 242 U. S. 430-434.

Layne & Co. v. Western Wellworks, 261 U. S. 387-393.

Magnum Co. v. Coty, 262 U. S. 159-163.

ARGUMENT.

I.

PETITIONERS ASSUME AN ERRONEOUS AND MISLEADING STATE OF FACTS IN SUPPORT OF "REASONS RELIED UPON FOR ALLOWANCE OF WRIT", AS SET FORTH IN PETITION, AND IN "SPECIFICATIONS OF ERRORS" RELIED ON IN THEIR BRIEF IN SUPPORT OF PETITION, IN THE FOLLOWING PARTICULARS:

A. Petitioners state that tariffs of the line-haul carriers included the service of loading and unloading the livestock at the Union Stock Yards, Chicago, whereas such tariffs included only transportation to the stock yards and the absorption of a specific amount in cents per car for loading and unloading.

The tariffs of the line-haul carriers covering transportation to the Stock Yards were not offered in evidence. The absorption tariffs in which all line-haul carriers joined, known as the "Lowry Tariff" and covering terminal charges which would be absorbed by the line-haul carriers was offered in evidence. Such tariff is attached to Defendant's Exhibit 1 as Exhibit 2 thereto. This exhibit is not printed in the record, but the original was certified as a part thereof and is before the Court. The absorption tariff, page 37, provides:

"CARRIERS AS SHOWN WILL PAY THE UNION STOCK YARDS AND TRANSIT COMPANY'S CHARGES AS FOLLOWS:

Loading	Unloading
In cents per car	In cents per car.
50	25 "

All line-haul carriers joined in such tariff. The rates of the line-haul carriers were predicated on the livestock being loaded and unloaded by the shippers. (Witness Byers, Defendant's Exhibit 6, page 459; not printed in record, but original certified up as a part thereof.)

The tariffs of the line-haul carriers were with reference to the appropriate classifications and referred thereto, and to the absorption tariff for the terminal charges that would be absorbed. (Witness Byers, Defendant's Exhibit 7, pages 1251 and 1252, not printed in record, but certified up as a part thereof.)

In Defendant's Exhibit 1, it is stipulated by the parties that the classifications provide "general regulations, form of contracts and terms and conditions for the said transportation by said line-haul carriers." (R. 297, Paragraph 12 and Paragraph 16; R. 298, Paragraph 20; R. 299, Paragraph 23.)

The Classifications provided:

> "The consignor and consignee are responsible for the loading and unloading the same, the carrier assuming no liability whatever in regard to the loading and unloading."

(Official Classification, Rule 8, page 223, Exhibit 3 to Defendant's Exhibit 1; Western Classification No. 54, Rule 11, page 249, Exhibit 4 to Defendant's Exhibit 1; Western Classification No. 55, Rule 3, page 282, Exhibit 5 to Defendant's Exhibit 1; Consolidated Freight Classification No. 1, issued by the Director General and including all carriers under Federal control, page 64, Exhibit 6 to Defendant's Exhibit 1.)

Consolidated Classification, Rule 8 (b), page 70, Section 1, being Exhibit 6 to Defendant's Exhibit 1, and Western Classification No. 55, Rule 22, page 13, Section 1, being Exhibit 5 to Defendant's Exhibit 1, provide:

"Owners are required to load into or on cars freight for forwarding by rail carriers and to unload from cars freight received by rail carriers carried at carload ratings."

Illinois Classification covering intrastate shipments in Illinois, Rule 19, provides:

"(b) Consignors and consignees will be required to load and unload all freight upon which carload ratings are applied."
(Exhibit 6 to Defendant's Exhibit 1).

All shipments involved consisted of carloads moving on carload ratings. (Stipulation of parties, Defendant's Exhibit 1, R. 240, Paragraph 44.)

Defendant's Exhibit 1 is a Stipulation of Facts in forty-six paragraphs and is printed in the record. Preamble, Paragraphs 1 to 11 both inclusive, and paragraphs 26 to 46 both inclusive, are found in Record 232 to 240, and paragraphs 12 to 25, both inclusive, are found in Record pages 296 to 299, both inclusive. The exhibits to Defendant's Exhibit 1 are not printed, but the original Exhibit 1, with all exhibits thereto, has been certified up as a part of the record.

The Uniform Livestock Contract published in the Official and Consolidated Classifications, and used by all line-haul carriers for many years provided in the receipt for the livestock as follows:

"THIS AGREEMENT * * * WITNESSETH, That the carrier has received from the shipper, subject to the classifications and the tariffs in effect, on the date of issue of this Agreement, the livestock described below in apparent good order, except as noted, consigned and destined as indicated below, *which the carrier agrees to carry to its usual place of delivery at said destination if on its road; otherwise to deliver to another carrier on the route to said destination.*" (Italics ours.)

Said contract also provides in Section 5 of Conditions that the shipper is to load and unload the livestock at his own expense. (Exhibit 3 to Defendant's Exhibit 1, pages 71 and 72; Exhibit 6 to Defendant's Exhibit 1, pages 62 and 63; Testimony Witness Mosier, Defendant's Exhibit 6, page 150 not printed in record, but original certified up as a part thereof.)

During the time the Stock Yard Company's charges were 25c for unloading and 50c for loading, the absorption tariff of the line-haul carriers permitted them to pay the full amount of the Stock Yard Company's charges, and during such time the shippers paid only the line-haul rates plus the terminal charge of $2.00, but that does not mean that the line-haul carriers held themselves out to transport the stock to the Stock Yards and unload the same for the line-haul rate, plus the terminal charge. It means that so long as the absorption tariff might remain in effect and the Stock Yard Company's charges remained the same, the shipper would have to pay no more than such rates. The fact that the amount agreed to be absorbed covered the entire charge of the Stock Yard Company furnishes the only foundation for petitioners' claim that the line-haul carriers' tariffs covered the unloading as well as the transportation of the livestock to the Stock Yards.

Petitioners repeatedly assert that the terminal charge included the loading and unloading of the livestock. Such statement is erroneous. The terminal charge was established on account of the charge the Junction Company made against the line-haul carriers for use of its rails in moving the cars, by the line-haul carriers over the Junction Company's rails to and from the Stock Yards, and also took into consideration the fact of the absorptions the line-haul carriers were making pursuant to their absorption tariffs. The trackage charge made by the Junction Company against the line-haul carriers was 75c per car each way (loaded one way

and empty the other), a total of $1.50 per car. The cost to the line-haul carriers in moving the car each way with their own locomotives and crews was a substantial amount, and in addition, the line-haul carriers were absorbing 25c for unloading and 50c for loading each car of livestock. (Testimony Witness Byers, Defendant's Exhibit 6, pages 475-6, not printed in record, but original certified up as a part thereof.)

These facts justified the *amount* of such $2.00 terminal charge, but do not show any agreement or obligation to do the unloading as such. The absorption tariff was a notice to the shippers that they would be relieved from the payment to the Stock Yard Company of its tariff rates, to the extent, however, therein specifically stated; viz., 25c per car for unloading and 50c per car for loading, and that the trunk line carriers would pay such amounts to the Stock Yard Company for its services; not that such trunk line carriers would perform the services themselves, but simply that they would pay said amounts to the Stock Yard Company for the services performed by it. The tariffs, classifications and Uniform Livestock Contract precluded the idea of any obligation to load or unload. There was no obligation on the part of the trunk lines to continue such absorptions, and if said absorption tariff had been withdrawn, the shippers would have had to pay to the Stock Yard Company the amount of its tariff rates, in addition to the road-haul rates, plus the terminal charge of $2.00 per car.

The finding of the Commission in this proceeding is exactly contrary to petitioners' contention. Such finding is:

> "In this case there are no tariff provisions requiring the line-haul carriers to make deliveries off their rails." (R. 138).

The Commission cites in support of the foregoing its earlier opinion in *Boardman & Co. v. S. P. Co.*, 37 I. C. C. 331, and states:

"In *Boardman & Co. v. S. P. Co.*, 37 I. C. C. 331, the Commission stated that in the absence of tariff provisions to the contrary, the line-haul rate of a particular carrier includes the receipt or delivery of carload freight only at industries or other points located upon its own rails." (R. 138).

It is thus seen that the record does not support petitioners' contention that the tariffs of the carriers obligated them to do the loading and unloading at their own expense or to pay the charges of the Stock Yard Company for such services, whatever they might be. On the contrary, the record affirmatively shows that the tariffs and the rates charged create no such duty, and show such contention to be entirely without foundation.

B. Petitioners ignore the fact that the Stock Yard Company was an independent common carrier holding itself out to perform the loading and unloading service on its own property devoted to public use for which it published a tariff of its charges.

C. Petitioners ignore the fact that the loading and unloading of livestock at the stock yards was a part of the transportation thereof, performed by an independent common carrier with its own employes and upon its own premises devoted to public use.

The Stock Yard Company at the suit of the Interstate Commerce Commission in 226 U. S. 286, was held to be a common carrier of livestock in the operation of its stock yards and was required to file tariffs of its charges with the Commission. The Stock Yard Company thereafter changed the form of its lease of its railroad tracks to the Junction Company, and at the time of the filing of its tariff increasing its charges and its tariff seeking to cancel its charges, was attempting to escape from the holding of the Supreme

Court, and was contending that it was no longer a common carrier. What its representatives did and said in the proceeding before the Commission must be construed with reference to such effort on its part. The Interstate Commerce Commission refused to permit it to cancel its tariffs and required same to be kept in effect during all of the time covered by this controversy. In the proceeding leading up to the award involved in this suit, the Commission in its first and second opinions, and throughout the entire proceeding, held that the Stock Yard Company was still a common carrier.

In its first opinion, the Commission after discussing the opinion of the Supreme Court holding the Stock Yard Company was a common carrier, said:

> "It is clear, therefore, that in holding the Stock Yard Company a common carrier the Court certainly had in mind the particular activities of that company with reference to shipments of livestock." (R. 128).

In the same opinion the Commission further said:

> "Upon the facts of record we find that:
> 1. The Union Stock Yard and Transit Company of Chicago is a common carrier engaged in interstate commerce and subject to the provisions of the Act to Regulate Commerce.
> 2. The notice of cancellation of its tariff of charges for loading and unloading livestock in carloads at the Chicago Stock Yards has not been justified." (R. 138-139).

In its second opinion on rehearing, the Commission adhered to such conclusion, saying:

> "We adhere to our finding that the Stock Yard Company is a common carrier engaged in interstate commerce." (R. 144).

In Paragraph 27, Defendant's Exhibit 1 (R. 236), it is stipulated that the loading and unloading of livestock was performed by employes of the Stock Yard Company, and that the unloading platforms, chutes and yards were owned by and were on the premises of the Stock Yard Company. The transportation service the Stock Yard Company performed on a shipment to the yards was the unloading and delivering to the consignee. Paragraph 3, Section 1 of the Act to Regulate Commerce provides:

> "The term 'transportation' * * * shall include * * * all services in connection with the receipt, delivery * * * storage and handling of property transported."

This Honorable Court in *Covington Stock Yards v. Keith*, 129 U. S. 126, and in *United States v. Union Stock Yards*, 226 U. S. 286, said:

> "The transportation of livestock begins with their delivery upon its cars, and ends only after the stock has been unloaded and delivered, or offered to be delivered to the consignee, if to be found at such place as admits of their being safely taken into possession."

Hence, the service of the Stock Yard Company in unloading the livestock from the cars and placing them in proper pens was a part of the through transportation and its published rates for such service constituted one of the several separate factors making up the through transportation rate from point of origin to final destination, viz., stock pens in the Stock Yards.

The Stock Yard Company, in unloading and delivering the stock to the consignee was engaged in the transportation thereof upon its own property devoted to that public use, and was entitled to reasonable compensation for the transportation service it performed, and being required to file its tariffs thereof, was entitled to collect the charge made un-

less and until found by the Commission to be unreasonable. No claim that its charge was unreasonable has been made in this proceeding.

The line-haul carriers did not join in the Stock Yard Company's tariff; nor did the Stock Yard Company join in the line-haul tariff. (Defendant's Exhibit 1, Paragraphs 5 and 6, R. 233-234; Paragraph 26, R. 235). The Stock Yard Company was therefore an independent common carrier with its own tariffs and was a connecting carrier to the line-haul railroads just as any railroad with its separate tariffs in cases of shipments beginning on one road and ending on another. The Stock Yard Company's service was a necessary one in completing the transportation and delivery to the consignee. Such transportation was necessarily done by the common carrier owning the facilities necessary thereto and furnishing the employes therefor. The line-haul carriers could not go upon said premises or perform such service any more than they could go upon the premises of another common carrier without a contract authorizing them to do so. Such a contract as between the Stock Yard Company and the line-haul carriers did not exist. Except for the absorption tariff of the line-haul carriers, the shippers would have been required to pay the entire charge of this connecting common carrier for completing such transportation.

D. Petitioners repeatedly state that the Stock Yard Company was the agent of the line-haul carriers in performing the service of loading and unloading livestock, whereas the record shows it was an independent connecting common carrier, performing its service under and pursuant to its published tariffs and without any arrangement or contract with the line-haul carriers, and without any joint tariff in respect to same.

E. Petitioners ignore the fact that the Stock Yard Company did not join or concur in the tariff of the line-haul carriers and that the line-haul carriers did not join or concur in the Stock Yard Company's tariff.

F. Petitioners ignore the testimony conclusively showing no relation of agency, either by reason of contract or tariff provisions, existed.

The Stock Yard Company in its tariff increasing its charges, effective May 21, 1917, stated:

> "The charge made by this company for the service (as a carrier's agent) of loading and unloading livestock at the Union Stock Yards, Chicago, Illinois, is as follows, etc."

The same statement is made in a supplement effective June 21, 1917.

In a supplement issued July 17, 1917, purporting to be effective September 1, 1917, but suspended by the Commission and never permitted to go into effect, and in which the Stock Yard Company sought to withdraw and cancel entirely its tariff covering its loading and unloading charges, the Stock Yard Company stated:

> "The loading and unloading platforms of the Union Stock Yards and Transit Company of Chicago will in the future be used or available for the use of the railways entering Chicago and using them as terminal stations under operating agreements."

In this supplement there is no pretension that same is filed as agent of the line-haul carriers. It does hold out an invitation to such carriers to make operating agreements, but no operating agreements were ever made, and the tariff was not permitted to become effective and was ultimately entirely withdrawn.

In no other tariff of the Stock Yard Company was there any pretension of agency. (Exhibit 1 to Defendant's Exhibit 1, original certified as a part of the record).

These tariffs of the Stock Yard Company were not concurred in by the line-haul carriers; nor did they authorize or consent to the filing thereof or acquiesce in the statements made therein. The line-haul carriers not only refused to increase their absorptions, but refused to permit the Stock Yard Company to retain the increased amount of the charges out of the line-haul carriers' revenues collected by the Stock Yard Company. To be effective as a joint tariff or to show concurrence therein by line-haul carriers, their names must appear in the tariff and each carrier must also file his assent thereto with the Commission.

Section 6, Paragraph 4, of the Act to Regulate Commerce provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission * * *." (49 U. S. C. A., Section 6, Paragraph 4, p. 281).

In reference thereto, Witness O. T. Henkle, General Manager of the Stock Yard Company, testified that the Stock Yard Company had no authority from the line-haul carriers to increase its charges, (Defendant's Exhibit 6, page 344), and that the Stock Yard Company had no contract with the line-haul carriers (Defendant's Exhibit 6, page 354); also that the Stock Yard Company had no agreement to charge the loading and unloading to the line-haul carriers. (Defendant's Exhibit 7, page 1212).

Witness C. C. Chace, Auditor of the Stock Yard Company, testified that the Stock Yard Company did not increase its charges at the instance of the line-haul carriers

and that the charges were increased for its own benefit and it kept the benefits. (Defendant's Exhibit 6, p. 372).

Witness H. W. Byers, Freight Traffic Manager of the Chicago & North Western Railway Company, testified that the carriers did not authorize the statement in the tariff that the service would be performed "as a carrier's agent," and did not authorize such pretended agency. (Defendant's Exhibit 7, page 1260).

Witness T. D. Gohegan, Traffic Assistant to the Director General, testified that he had examined the files of the Commission and that they contained no showing that line-haul carriers had assented to or become a party to the Stock Yard Company's tariff and showed no authority from the line-haul carriers to the Stock Yard Company to state that the service performed by it in loading and unloading would be performed "as a carrier's agent." (Defendant's Exhibit 11, page 1242).

Defendant's Exhibit 6, 7 and 11 are not printed in the record, but are certified up as a part thereof.

It is fundamental that agency cannot be shown by admissions of the alleged agent. The record is barren of anything whatever to show the Stock Yard Company an agent of the line-haul carriers in respect to any transportations service performed by it. Petitioners rely for such contention entirely on such statement in the tariff, a self-serving statement on the part of the Stock Yard Company in its effort to avoid responsibility as a common carrier and to escape the requirement that it file and maintain tariffs covering its charges.

It has been conclusively adjudicated herein to be a common carrier. The plaintiffs herein resisted the effort of the Stock Yard Company to avoid responsibility as a common carrier and it was on plaintiffs' complaint such adjudication was had. Manifestly, such statement of the Stock Yard Company under such circumstances cannot establish the

Stock Yard Company to be an agent of the line-haul carriers and cannot overcome the legal effect of the Stock Yard Company being a common carrier performing a part of the transportation of the livestock on its own property devoted to public use, and pursuant to its published tariffs required to be filed, by a judgment of this Honorable Court, and which the Commission consistently refused to permit to be withdrawn or cancelled.

Surely the argument and petition based upon the contention that the Stock Yard Company was an agent of the line-haul carriers can furnish no basis for the granting of a writ of certiorari.

G. Petitioners assert that the Stock Yard Company did not collect the charges in controversy, whereas the commission found that it did so (First Opinion R. 123), the undisputed evidence so shows and petitioners in their petition in bringing this suit so allege. (R. 13).

In their petition filed in the District Court, petitioners allege that "Shippers and receivers of livestock, including plaintiffs, were compelled to and did pay the defendant, the Union Stock Yards and Transit Company * * * an amount in excess of the former tariff charges, etc." (R. 13).

In its first opinion in these proceedings the Commission found:

> "This increased charge the carriers refused to pay with the result that * * * the Stock Yard Company collected and retained such charges from the shippers." (R. 123).

The testimony in behalf of all of the plaintiffs was that the charges complained of were paid to the Stock Yard Company by checks naming it as Payee. The freight bills of the line-haul carriers after a controversy between them and

the Stock Yard Company, were made out showing the line-haul carriers' charges and an additional item of 25c, stated therein to be for unloading, and stating that same was assessed pursuant to the Stock Yard Company's tariff, referring to it therein by appropriate tariff reference. (Witness Byers, Defendant's Exhibit 6, pages 472-476, 496-498 and 504-512; printed excerpts, pages 37-43).

The freight bill was thus a composite bill containing the charges of the initial and delivering carriers, the charge of each being separately stated. True, when collected, the entire amount was turned over to the line-haul carriers weekly, and monthly bills for the portion of the Stock Yard Company's charges collected from the shippers and the portion covered by the line-haul carriers' absorption tariffs were rendered by the Stock Yard Company and paid by the line-haul carriers. This was merely for convenience in bookkeeping and in harmony with the practice theretofore in effect for the Stock Yard Company to render monthly bills for its charges covered by the absorption tariffs of the line-haul carriers before the Stock Yard Company increased its charges and precipitated the controversy with the line-haul carriers and the shippers.

The testimony with regard to the methods of collection was before the Commission and was the basis of its finding that the Stock Yard Company collected and retained the charges. This testimony was in the record before the Circuit Court of Appeals and is the basis of its conclusion that while the method was somewhat circuitous, still the evidence showed the Stock Yard Company collected and retained the charge in controversy. This charge was collected from the shippers because of the Stock Yard Company's tariff.

Mr. Henkle, General Manager of the Stock Yard Company, testified that if the Commission would permit the Stock Yard Company to cancel its tariff containing the

charge complained of, the Stock Yard Company would cease collecting same from the shipper. (Defendant's Exhibit 6, page 342, not printed in record, but original certified up to this Court as a part thereof).

C. C. Chace, Auditor of the Stock Yard Company, who made the collections, testified:

> "Q. Do you know under what authority the loading and unloading charges were collected or assessed?
> A. On the authority of the Stock Yards tariff."
> (Defendant's Exhibit 9, page 181, not printed in record, but original certified up to this Court as a part thereof.)

The testimony in behalf of the plaintiffs showed conclusively that the charges were paid to the Stock Yards Company by the commission men as agents of the shippers and with the shippers' own funds, the amount being taken out of the proceeds of the sales before remitting to the shippers. (See illustrative testimony Witness Gillogly, Defendant's Exhibit 9, page 277; Witness Wilson, Defendant's Exhibit 9, pages 363 and 364).

H. The charge of the Stock Yard Company was limited to the service of loading and unloading.

Petition for certiorari, pages 5 and 6, asserts that the charge made by the Stock Yard Company included payment for its services in collecting the line-haul carriers' freight charges and certain other services of a non-common carrier character. This matter is not argued or referred to in the brief. In respect thereto, we merely desire to point out that the tariff of the Stock Yard Company expressly limits the charge to loading and unloading. The tariff makes a charge for weighing in some cases. For the other services performed by the Stock Yard Company, no charge is made.

They are not transportation services and the Stock Yard Company, in complying with the judgment of the Supreme Court of the United States and the requirements of the Commission, was not required to file tariffs therefor and did not do so. They were services performed in consideration of the benefit to the Stock Yard Company in conducting its great public market of the prompt release of the livestock without payment of charges, surrender of bill of lading, and the like. In consideration of such prompt release, the Stock Yard Company guaranteed the collection of the charges and the delivery to the right consignee, and in protecting its guaranty, counted the stock, checked its condition and collected the charges.

Such duties were, however, in actual practice substantially limited to the inbound shipments for unloading, for which it charged a lower amount than for loading. Notwithstanding in outbound shipments there was no collection of charges, no guaranty of collection or delivery to the right party, the Stock Yard Company charged a higher rate. If evidence was competent to show the charge made in the tariff covered something not indicated therein, such facts would be conclusive that only loading and unloading services were involved.

As pointed out in petitioners' brief at pages 11 and 12, even if the services of collecting charges, guaranteeing delivery, counting and checking the stock, were transportation services, there was no obligation on the part of the Stock Yard Company to make a charge therefor, and since its tariff filed made no charge it would seem to be conclusive that the charge of the Stock Yard Company did not include such services, but included only the loading and unloading service.

In support of the suggestion that there was no obligation to make a charge, petitioners cite *Interstate Commerce Commission v. Stickney*, 215 U. S. 98-105, which so holds.

II.

COMMON CARRIERS ENGAGED IN INTERSTATE COMMERCE ARE REQUIRED TO FILE TARIFFS OF THEIR CHARGES WITH THE INTERSTATE COMMERCE COMMISSION AND TO MAINTAIN AND ENFORCE THE SAME.

The duty to file tariffs covering all charges made by a common carrier engaged in interstate commerce is established by the express mandate of the statute. (Act to Regulate Commerce, Section 1, Paragraphs 3 and 6; Section 6, Paragraphs 1 and 7; Appendix 47-49). Such statutes require the filing of tariffs of rates and also require the carriers to "establish" and "enforce" classifications "with reference to such rates, tariffs, regulations, practices, etc." The duty to enforce tariff provisions, including classification provisions, has been repeatedly emphasized by the courts and by the Commission. A duly published tariff has the effect of law, and all shippers are presumed to know of the tariff and classification provisions.

In *Louisville & Nashville Railway Co. v. Maxwell*, 237 U. S. 94-98, this Honorable Court announced the rule as follows:

> "Under the Interstate Commerce Act the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it and they, as well as the carrier, must abide by it unless it is found by the Commission to be unreasonable."

In *Keogh v. Chicago & North Western Railway Co.*, 260 U. S. 156-163, it is said:

> "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff, un-

less and until suspended or set aside. This rate is made for all purposes the legal rate as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."

In *Louisville & Nashville Railway Co. v. Central Iron Works*, 265 U. S. 59-65, it is said:

"The shipment being an interstate one, the freight rate was that stated in the tariff filed with the Interstate Commerce Commission. The amount of the freight charge legally payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

In *Davis v. Henderson*, 266 U. S. 92-93, this doctrine was applied to a tariff rule requiring the ordering of cars to be in writing. In upholding the rule, the court said:

"There is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of a common carrier under published tariffs."

It follows that the Stock Yard Company, being a common carrier in interstate commerce, was forced by judgment of this Honorable Court and requirements of the Commission to file tariffs of its charges. It was bound to collect such charges from the party benefited by the service it rendered and for which the charges were made, unless by tariffs legally filed and published, the line-haul carriers were authorized to absorb all or a part thereof. To the extent

the charges were not absorbed by line-haul carriers, the Stock Yard Company was bound to collect from the shipper for whom the service was rendered.

Petitioners say there is no showing that the Stock Yard Company's tariffs were filed in the stations of the line-haul carriers. We suggest there is no showing to the contrary, but more in point, there was no necessity under the statute for doing so. Section 6, Paragraph 1, of the Act to Regulate Commerce, requires the carrier to keep its own tariffs on file in its stations and offices, but makes no requirement that it keep on file the tariffs of connecting carriers in which it has not joined. The filing of the tariffs of the Stock Yard Company with the Interstate Commerce Commission was of itself notice to all shippers of its provisions. Such filing gave the Stock Yard Company's tariffs the force and effect of law. The filing of the absorption tariffs with the Commission gave them the force and effect of law. All shippers were bound to know the provisions of the Stock Yard Company's tariffs and the provisions of the absorption tariff and to know there was a 25c charge for the service rendered them by the Stock Yard Company, which was not covered by the absorption tariffs and which they, therefore, were required to pay.

The opinion of the Circuit Court of Appeals is in accordance with the foregoing announcements of this Honorable Court and is based upon applicable facts.

III.

THE APPLICABLE TARIFFS WERE PLAIN AND UNAMBIGUOUS. NO ADMINISTRATIVE FUNCTION OF THE COMMISSION WAS INVOLVED AND THE CIRCUIT COURT OF APPEALS DID NOT INFRINGE UPON ANY JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION.

The Court in reaching its conclusion that the charges were lawfully collected by the Stock Yard Company relied upon the fact that it was a common carrier, had been forced to file its tariffs and was bound to enforce them, and upon the tariffs and classifications governing the transportation and the services involved. The Stock Yard Company's tariff is as simple as words could make it. The only charge contained therein is for loading and unloading, and clearly states the amount of such charges. The absorption tariff of the line-haul carriers is equally simple and states that the line-haul carriers will pay to the Stock Yard Company 25c for unloading and 50c for loading each car of livestock. The classifications offered in evidence are likewise equally simple. The question of the reasonableness of the Stock Yard Company's charges was not presented; the question of whether or not the line-haul carriers should absorb a greater amount, than their absorption tariffs provided for, was not involved. The Commission did not find the provisions of either tariff were unreasonable or unlawful. The Commission found, notwithstanding the tariff provisions, that the "collection of separate charges from the shippers for unloading or loading in addition to the rates on livestock from and to interstate points to and from the Stock Yards was an unlawful and unreasonable practice." (R. 144-145).

This finding was a conclusion of law and not an exercise of any administrative function. The Circuit Court of

Appeals construed the plain provisions of the tariffs which we have seen determine the legal rate and reached a different conclusion from that announced by the Commission. The Circuit Court of Appeals in effect said that because of the tariff provisions, the collection of the additional amount was not an unlawful practice. The question was a judicial, not an administrative one. It was the determination of the legal status created by published tariffs. That Courts have abundant authority to determine such matter has been repeatedly held by this Honorable Court. Such was the case of *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U. S. 285-294, where the Court said:

> "Here no fact evidential or ultimate is in controversy and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of the words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction and preliminary resort to the Commission was therefore unnecessary."

In *Interstate Commerce Commission v. Louisville & Nashville Railway Co.*, 227 U. S. 88-91, it is said:

> "But the legal effect of evidence is a question of law."

The evidence was undisputed; the tariffs contain ordinary words used in their ordinary sense, and it was the province and duty of the Court to determine the legal effect of them.

The Commission, instead of exercising an administrative function in finding that the collection of the separate charge was an unlawful practice, exercised a judicial one. Its judicial conclusion was contrary to that of this Honorable Court in *Interstate Commerce v. Stickney*, 215 U. S. 98-104, where

the $2.00 terminal charge was directly attacked as a separate charge and upheld by the Court. Such conclusion is contrary to Paragraph 1 of Section 6 of the Act to Regulate Commerce, which requires that the carrier "shall also state separately all terminal charges, etc." and is contrary to the duty of the Stock Yard Company, a common carrier required to publish its tariffs and entitled to compensation for the only service of transportation for which it made a charge. There was no infringement in the opinion of the Circuit Court of Appeals upon the jurisdiction of the Commission. The Court merely determined the "legal effect of evidence", which was undisputed.

IV.

THE ABSORPTION TARIFFS OF THE LINE-HAUL CARRIERS LIMITED AND MEASURED THEIR LEGAL RIGHT AND OBLIGATION TO CONTRIBUTE TO THE PAYMENT OF THE STOCK YARD COMPANY'S CHARGES.

What has been said in reference to the duty to file tariffs and the binding effect thereof is equally applicable here. Paragraph 7 of Section 6 of the Act to Regulate Commerce provides that no carrier shall engage or participate in transportation unless its rates have been filed with the Commission, and forbids a departure from the rates when filed, and further provides:

> "Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The absorption of any part of the charge of another carrier constitutes a concession to the shipper. The concession

can be made only by filing a tariff specifying same. The tariff defines and limits the amount of such concession. The line-haul carrier cannot absorb more than the amount designated in the tariff filed. The line-haul carriers refused to amend their tariffs to permit of absorbing the increased charge of the Stock Yard Company, and refused to violate their tariffs by paying more than the tariffs provided. The question of whether they should have done so was presented, but the Commission expressly found:

> "The record is not sufficient to enable us to reach a judgment as to what portion of the loading and unloading charge at the Chicago Stock Yards should be absorbed by the line-haul carriers." (R. 136).

How then, could the line-haul carriers be held liable for refusing to pay the increased charge to the Stock Yard Company, and how could the collection of such charge by the Stock Yard Company, in pursuance of its published tariff, which it was not permitted to withdraw, create a liability on the Director General, who was operating the line-haul carriers?

V.

THE INTERSTATE COMMERCE COMMISSION COULD NOT FIND THE REFUSAL OF THE CARRIERS TO ABSORB THE INCREASED CHARGE OF THE STOCK YARD COMPANY WAS UNREASONABLE OR REQUIRE THE ABSORPTION OF THE SAME WITHOUT EVIDENCE SHOWING THE LINE-HAUL RATE, PLUS THE TERMINAL CHARGE, WAS SO HIGH AS TO BE UNREASONABLE, UNLESS THE INCREASED CHARGE SHOULD BE INCLUDED IN THE ABSORPTIONS PROVIDED FOR, NOR WITHOUT EVIDENCE AND A FINDING THAT A FAILURE TO ABSORB SUCH INCREASED CHARGE WOULD RESULT IN DISCRIMINATION.

No issue was presented as to the reasonableness of the line-haul rate or the $2.00 terminal charge, nor as to the reasonableness of the charge of the line-haul carriers as a whole, and no evidence was presented thereon. The fact that rates had been raised from time to time furnishes no basis for suggesting that absorptions should have been increased. The evidence does not show such increases and they are suggested for the first time by petitioners in their petition and brief filed in this Court. We assume, however, they are matters of which the Court may take judicial notice, just as it will take judicial notice of the guaranty to carriers contained in the Transportation Act of 1920 for a period of six monhs after Federal control ended, and the increase in rates to the carriers granted by the Commission, pursuant to the mandate in the Transportation Act, in its proceeding known as *Ex Parte* 73, such increase being effective September 1, 1920, and ranging from 25% to 40% over existing rates at the end of Federal control, and that such increases applied to livestock rates. Such increases in rates mentioned by petitioners and as made in *Ex Parte* 73 prove nothing and have no place in this proceeding. The fact remains that the

carriers could not be required to increase their absorptions without an issue and evidence showing that in view of the rates they were collecting, they should be required to do so. Such matter would involve a finding that the rates being collected were unreasonably high, unless the additional charge should be absorbed. See *Baltimore & Ohio R. R. Co. v. United States*, 277 U. S. 291, 301-2.

The Commission would also be obliged to find that discrimination would otherwise result in order to require the additional absorptions. The Commission so held in *Wells Paper Co. v. P. R. R. Co.*, 62 I. C. C. 705-708 and *Hunt Ferris & Co. v. Chicago & North Western Railway Co.*, 68 I. C. C. 283-4, and in many other cases.

The Commission in these proceedings expressly found the evidence did not show discrimination in respect to the absorptions, (R. 135-136), and also that the evidence was insufficient to show the amount of the loading and unloading charges the carriers should absorb. (R. 136). The Commission, therefore, did not attempt or intend to authorize or require an increase in the absorptions or an amendment of the line-haul carriers' absorption tariffs. It attempted to exercise a judicial—not an administrative function—and its judicial conclusions are subject to review by the Courts.

VI.

THE APPEAL TO THE CIRCUIT COURT OF APPEALS WAS FROM THE JUDGMENT ENTERED IN THE DISTRICT COURT, AND NOT FROM THE REASONS THEREFOR ANNOUNCED BY THE DISTRICT JUDGE, AND SINCE THE CIRCUIT COURT OF APPEALS BASED ITS JUDGMENT OF AFFIRMANCE ON AN ENTIRELY DIFFERENT GROUND, THE REASONS ANNOUNCED BY THE DISTRICT JUDGE MAY NOT BE CONSIDERED IN DETERMINING WHETHER PETITION FOR CERTIORARI SHOULD BE GRANTED.

The District Judge, in directing a verdict and in entering judgment for respondents, relied on the conclusion that the petitioners were not the parties who bore the charges complained of, and did not have such interest as would entitle them to maintain the suit. The District Judge did not pass upon the other defenses presented by respondents. The Circuit Court of Appeals refused to adopt the reasons expressed by the District Judge and based its judgment of affirmance on another defense presented by respondents. (R. 135-136).

The jurisdiction of this Honorable Court to review by certiorari a case of this character does not extend to judgments of a District Court. The jurisdiction to review by certiorari decisions of Federal Courts is found in Title 28, U. S. C. A. Section 347, and is limited to Circuit Courts of Appeal and Court of Appeal of the District of Columbia. Since the Circuit Court of Appeals did not determine whether petitioners have such interest as will entitle them to maintain the suit, its judgment cannot be reviewed by certiorari in respect to that question. Its judgment, if reviewed at all, must be in reference to the grounds upon which it determined the

case. The reasons moving the District Judge can therefore furnish no basis for granting the writ.

VII.

NO QUESTION OF PUBLIC IMPORTANCE OR OTHER QUESTION ON ACCOUNT OF WHICH A WRIT OF CERTIORARI SHOULD BE GRANTED, IS PRESENTED.

The object of this suit is to recover certain moneys, collected from in excess of 174,000 shippers, through the petitioners as agents of the shippers, and paid from the shippers' funds. Petitioners now ask this Court to review the decision of the Circuit Court of Appeals which decided adversely to them. However important pecuniarily such decision may be to these petitioners, it would not appear to involve any question of public interest and general importance, and certainly no conflict between the decisions of State and Federal Courts, or between Circuit Courts of Appeal of different circuits, and therefore is not of the character which under the statutes, decisions and rules of this Court authorize or justify the granting of the writ of certiorari. No principle or precedent to govern future shipments is involved, since Congress in enacting the Transportation Act 1920 amended Section 15 of the Act to Regulate Commerce by requiring the line-haul carriers to pay the loading and unloading charges on all shipments of livestock of the character involved, delivered at or received from public markets, and all line-haul carriers have so amended their tariffs as to comply therewith.

The reasons suggested in the petition for certiorari for granting the writ, and in the errors assigned in the brief, assume facts not shown in the record, and ignore facts shown therein, as we have pointed out in Division I of our Argument, and suggest questions which were not decided or determined by the Circuit Court of Appeals and which do not

inhere in its judgment. The decision of the Circuit Court of Appeals, when considered in light of the real facts presented and considered by that Court, presents merely a question of whether a legal liability existed on the part of respondents to repay the charges collected by the Stock Yard Company. Such question is merely one between the parties in interest, is not a matter of public interest, and since a writ of certiorari will not be granted merely to review the correctness of the judgment of the Circuit Court of Appeals, no ground for granting the writ is presented.

The language used by this Court in the case of *Magnum Import Co. v. Coty*, 262 U. S. 159, 163, is very appropriate to the case at bar, viz.:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first, to secure uniformity of decision between those courts in the nine circuits, and, second, to bring up cases involving questions of importance, which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

For lack of sufficient reasons, we submit that the application for a writ of certiorari should be denied.

Respectfully submitted,

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A. A. MCLAUGHLIN,

Counsel for Respondent Andrew W. Mellon, Director General of Railroads.

APPENDIX.

Act to Regulate Commerce

Section 1.

(3) *Definitions.* The term 'common carrier' as used in this chapter shall include all pipe-line companies; telegraph, telephone, and cable companies operating by wire or wireless; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation or transmission as aforesaid as common carriers for hire. Wherever the word 'carrier' is used in this chapter it shall be held to mean 'common carrier'. The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. The term 'transmission' as used in this chapter shall include the transmissions of intelligence through the application of electrical energy or other use of electricity, whether by means of wire, cable, radio apparatus, or other wire or wireless conductors or appliances, and all instrumentalties and facilities for and services in connection with the receipt, forwarding, and delivery of messages, communications, or other intelligence so transmitted, hereinafter also collectively called messages.

(6) *Classification of property for transportation; regulations and practices.* It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of prop-

erty for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

Section 6.

(1) *Schedule of rates, fares, and charges; filing and posting.* Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other chrges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every

depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such forms that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

(4) *Joint tariffs.* The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

(7) *Transportation without filing and publishing rates forbidden; rebates; privileges.* No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier, have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.